

U.S. Department of Labor

Office of Administrative Law Judges
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Date: February 28, 2001

Case No.: **2000-LHC-0808**

OWCP No.: **06-179874**

In the Matter of:

JARAMILLO CRUZ,
Claimant,

v.

RECCHI AMERICA, INCORPORATED,
Employer,

and

NEW HAMPSHIRE INSURANCE COMPANY
C/O AIG CLAIMS SERVICE,
Carrier.

Representation: Cletus W. Bergen II, Esq.
For the Claimant

Colin A. McRae, Esq.
For the Employer

Before: **RICHARD K. MALAMPHY**
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim filed under the provisions of the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C. § 901 et seq.

On August 9, 2000, a formal hearing was held in Savannah, Georgia. The parties presented evidence and their arguments at the hearing held by the undersigned, and as provided by the Act and the applicable regulations. The findings and conclusions that follow are based upon a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations and pertinent precedent.

Stipulation of Facts¹

Employer, Recchi America, and Claimant, Jose Cruz Jaramillo, stipulated to the following facts:

1. On May 17, 1999, Claimant was involved in an accident in which he suffered injury to his right foot;
2. An employer/employee relationship existed between Employer and Claimant at the time of the accident;
3. The injury occurring on May 17, 1999, arose in the course and within the scope of Claimant's employment with Employer;
4. As a result of the accident, Claimant was temporarily totally disabled from May 17, 1999 until September 11, 2000;
5. Claimant returned to work with a permanent partial disability rating of 12%;
6. Claimant reached maximum medical improvement on or about June 27, 2000 and returned to work with a right lower extremity impairment of 12%;
7. Claimant returned to work and is now drawing permanent partial disability payments under the State of Georgia's Workers' Compensation System for the permanent partial disability rating of 12%;
8. Claimant's average weekly wage at the time of the injury was \$560.00 per week, 2/3 of which is \$373.33;

¹The following abbreviations will be used as citations to the record:

Ex.- Employer's exhibits.

Cx.- Claimant's exhibits.

Tr.- Transcript of hearing held on August 9, 2000 before Administrative Law Judge Richard K. Malamphy.

9. That the Brunswick River over which the old Sidney Lanier Bridge and the new bridge under construction span is a navigable stream within the meaning of the Act.

The undersigned accepts the stipulations that are stated above.

Issue

Whether the injury suffered by Claimant on May 17, 1999 meets the requirements of situs and status for jurisdiction under the Act.

Findings of Fact

Claimant worked as a carpenter's and welder's helper at Employer's construction site for four months prior to his injury. (Tr. at 40, 59.) He testified that the construction site is approximately one thousand feet from land in the Brunswick river. (Tr. at 56.) Every day Claimant would travel from the side of the river to the construction site by barge. (Tr. at 40.) He would sometimes use the same barge that transported steel I-beams and other construction materials to the site. (Tr. at 40-41.)

Claimant's supervisor would occasionally direct him to help unload the steel beams. (Tr. at 65.) However, Employer never specifically assigned Claimant to work on the barge.² (Tr. at 60.) Claimant stated that he helped unload steel beams onto the platform from the barge by unstrapping the beams from the crane, which is attached to the rock island and pier structure. (Tr. at 35-36, 41-42; see Ex. 2, point B.) Claimant testified that he would participate in unloading the beams up to five times a day and he would always unload the beams from the barge to the pier. (Tr. at 42, 73.) It would take approximately five minutes for Claimant to unhook the steel beams from the crane. (Tr. at 60.) At times, he also helped unload other materials like pipes, cables, tools, and wood. (Tr. at 54-55.) After unloading the steel beams, Claimant would use plywood, two-by-fours, and steel beams to fashion shelter for the workers from the sun. (Tr. at 65-68.)

On May 17, 1999, Claimant worked on top of the conex (20-foot container) cleaning the work area. (Tr. at 38, 62; see Ex. 2, point A.) During the course of the day, Claimant helped unload steel I-beams onto the conex. (Tr. at 62, 64.) Claimant hurt his foot shortly after he unhooked some steel beams from the crane. He had already started cleaning up leftover pieces of wood from the work area when a steel beam fell on Claimant's right leg and fractured his ankle. (Tr. at 68.)

² Claimant has never worked as a crew member on a vessel or navigated a vessel. (Tr. at 66.)

Claimant testified that he continues to work for Employer; however, he no longer performs the same job. (Tr. at 57.) Instead, he works in a light duty capacity outside of the bridge. (Tr. at 57.) He continues occasionally to load the steel beams onto the barges from the land. (Tr. at 57.)

Claimant testified that he saw large ocean-going commercial vessels, like container ships, pass under the bridge more than once a day during the months that he worked for Employer. (Tr. at 43-45.) He stated that the new bridge under construction is taller and wider than the old bridge, so it will be easier for the ships to navigate the river. (Tr. at 51-52.)

Discussion

While an injury on actual navigable waters is sufficient to establish coverage under both Sections 2(3) and 3(a) of the Act, Claimant may also establish coverage if his injury occurs on land covered by Section 3(a) (“situs”) and his work is maritime in nature, bringing him within the definition of maritime employee in Section 2(3) (“status”). Nelson v. Guy F. Atkinson Construction Co., 29 BRBS 39, 41 (1995); Pulkoski v. Hendrickson Bros., Inc., 28 BRBS 298, 301 (1994). The situs test limits the geographic coverage of the Act, while the status test is an occupational concept that focuses on the nature of the worker’s activities. Bienvenu v. Texaco, Inc., 164 F.3d 901 (5th Cir. 1999) (*en banc*).

For a claim to be covered by the Act, Claimant must establish that his injury occurred:

[u]pon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading and unloading, repairing, or building a vessel.)

33 U.S.C. § 903(a). “The situs test, in sum, is a geographical one, and even though a longshoreman may be performing maritime work, if he is not injured within the land area specified by the statute, he is not covered by the Act.” Jonathan Corp. v. Brickhouse, 142 F.3d 217, 222 (4th Cir. 1998).

Courts typically define bridges as extensions of land. See Crapanzano v. Rice Mohawk, U.S. Const. Co., Ltd., 30 BRBS 81, 82 (1996); Nacirema Operating Co. v. Johnson, 396 U.S. 212, 215 (1969). Thus, an injury that occurs on a bridge would not be considered “upon the navigable waters,” even though navigable waters flow under the bridge. Id. If a worker is injured on a bridge, road bed, pedestal, piling, or fixed part of the bridge attached to land or bedrock beneath the navigable waters, then he will not meet the situs requirement that the injury occur “upon navigable waters.” Rodriguez v. Aetna Casualty and Surety Co., 395 U.S. 353, 359 (1969). Considering the fact that Claimant injured himself on a fixed part of the new bridge that is attached to the river bed, he cannot establish that his injury occurred “upon the navigable waters.” Therefore, Claimant must show that the location of his injury constitutes an “adjoining area customarily used by an employer in loading and unloading, repairing, or building a vessel” to meet the situs requirement under the Act. 33 U.S.C. § 903(a).

In this case, Claimant asserts that he was injured on a site surrounded by navigable water where Employer unloaded construction materials from barges. The bridge construction site is approximately one thousand feet from land in the Brunswick River, which the parties stipulated is a navigable stream within the meaning of the Act. (Tr. at 56; see Stipulations.) Claimant testified that Employer regularly used the location to unload materials, including steel I-beams, from barges for use in constructing the new bridge. (Tr. at 42, 73.) Thus, Claimant argues that the location of his injury meets the situs requirement under the Act because it constitutes an “other adjoining area customarily used by [Employer] in loading, unloading...a vessel.” 33 U.S.C. § 903(a).

The nature of the location at the time of injury determines whether situs exists under the Act. Melerine v. Harbor Construction Co., 26 BRBS 97, 100 (1992). The Fifth Circuit, which provides persuasive authority in this case, found that a determination of coverage should focus on “the functional relationship or nexus between the ‘adjoining area’ and the marine activity on navigable waters.” Melerine v. Harbor Construction Co., 26 BRBS 97, 100 (1992) (citing Texports Stevedore Co. v. Winchester, 632 F.2d 504, 12 BRBS 719 (5TH Cir. 1980). In determining whether a site constitutes an “adjoining area” under Section 3(a), courts have considered: (1) the particular suitability of the site for the maritime uses referred to in the statute; (2) whether adjoining properties are devoted primarily to uses in maritime commerce; (3) the proximity of the site to the waterway; (4) and whether the site is as close to the waterway as is feasible given all of the circumstances in the case. Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 7 BRBS 409, 411 (9th Cir. 1978).

The periodic use of the site to unload construction materials does not constitute the traditional maritime activity envisioned by Congress when it expanded the jurisdiction of the Act to cover any “other adjoining area customarily used by an employer in loading and unloading...a vessel.” 33 U.S.C. § 903(a). In the Committee Reports, Congress provided a “typical example” of shoreward coverage.

[C]argo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area.

Northeast Marine Term. v. Caputo, 432 U.S. 249, 263 (1977) (citing S. Rep. 13; H.R.Rep. 10-11, U.S. Code Cong. & Admin. News 1972, p.4708). Congress extended the situs to “encompass the waterfront areas where the overall loading and unloading process occurs.” Id. at 272.

Claimant failed to show a sufficient nexus between the bridge site and the traditional maritime activity of loading and unloading vessels. The use of the site for unloading construction materials is

incidental to its primary purpose as the structural support for the new bridge. It contains no facility for mooring, loading or unloading boats. See Pulkoski v. Hendrickson Bros., Inc., 28 BRBS 298, 302 (1994). Employer did not use this location for unloading cargo that would be transported to a storage or holding area; instead, it used the location to unload barges carrying the building materials that it needed to complete the construction of the new bridge. Congress did not intend for this type of loading and unloading activity to convert Employer's construction site into a covered situs. Therefore, Claimant's injury does not meet the situs requirement of the Act and jurisdiction under the Act does not exist.

Order

Accordingly, it is hereby ORDERED that:

Claimant's request for disability benefits under the Act is DENIED.

JUDGE RICHARD K. MALAMPHY
Administrative Law Judge

RKM/kap
Newport News, Virginia